

**Brookside Manor, Inc. and Willowbrook, Inc. and District 1199-J, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO. Case 22-CA-10402**

April 21, 1981

**DECISION AND ORDER**

Upon a charge filed on November 6, 1980, by District 1199-J, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, herein called the Union, and duly served on Brookside Manor, Inc. and Willowbrook, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 22, issued a complaint and notice of hearing on December 4, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 25, 1980, following a Board election in Case 22-RC-8255, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;<sup>1</sup> and that, commencing on or about October 28, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On December 8, 1980, Respondent filed its answer to the complaint, and on February 24, 1981, Respondent filed an amended answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On January 30, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on February 3, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Sum-

mary Judgment should not be granted. Respondent thereafter filed an answer to the Motion for Summary Judgment.

Upon the entire record in this proceeding, the Board makes the following:

**Ruling on the Motion for Summary Judgment**

In its answer to the complaint and answer to the Motion for Summary Judgment, Respondent essentially contests the validity of the Union's certification. Although Respondent admits its refusal to bargain, Respondent denies that it thereby violated Section 8(a)(5) and (1) of the Act. Specifically, Respondent contends that the Union should not have been certified as the collective-bargaining representative of its employees because the Board erred in finding that Respondent is a joint employer under the Act.

In its memorandum in support of Motion for Summary Judgment, the General Counsel argues that there are no issues requiring a hearing, and that Respondent is attempting to relitigate issues which were raised and determined by the Board in the underlying representation case. We agree with the General Counsel.

Review of the record herein, including the record in Case 22-RC-8255, reveals that on June 19, 1980, the Union filed a petition seeking to represent in a single unit all registered nurses employed by Respondent at its two locations, and another unit of all licensed practical nurses and service and maintenance employees employed by Respondent at the same two locations. Following a hearing, the Regional Director for Region 22 issued a Decision and Direction of Election finding Respondent to be a joint employer engaged in commerce within the meaning of the Act and directing an election in the following units:

**Unit A**

All full-time and regular part-time registered nurses employed by the Employer, Brookside Manor, Inc. and Willowbrook, Inc., at its Wayne, New Jersey facilities, but excluding all office clerical employees, confidential employees, guards and supervisors as defined in the Act, and all other employees.

**Unit B**

All full-time and regular part-time service, maintenance and technical employees, including licensed practical nurses, employed by the Employer, Brookside Manor, Inc. and Willowbrook, Inc., located [at its] Wayne, New Jersey facilities, but excluding all office clerical employees, confidential employees, profes-

<sup>1</sup> Official notice is taken of the record in the representation proceeding, Case 22-RC-8255, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

sional employees, guards and supervisors as defined in the Act and all other employees.

Respondent filed a request for review, claiming that the Regional Director erred in not finding single units of employees presumptively appropriate. The Board denied Respondent's request for review.

Thereafter, an election was conducted among the employees in the above-described units. The tally of ballots in Unit A showed that of approximately five eligible voters, four cast ballots for the Union, one ballot was cast against the Union, and none were challenged or void. The tally of ballots in Unit B showed that of 79 eligible voters, 53 cast ballots for the Union, 5 ballots were cast against the Union, 1 ballot was void and 4 were challenged. The challenges were not determinative. No objections to the conduct of the election were filed. Accordingly, the Regional Director issued a Certification of Representative on September 25, 1980, certifying the Union as the exclusive representative of the employees in the units herein.

On or about October 15, 1980, the Union requested that Respondent bargain collectively with it with respect to the wages, hours, and working conditions of the employees in the units described above. On October 28, 1980, Respondent refused, and continues to refuse, to bargain with the Union. As noted above, Respondent refused, and continues to refuse, to bargain with the Union because of its belief that the Regional Director erred in finding that it was a joint employer and in directing an election in employerwide units. It thus appears that Respondent is attempting to raise herein issues which were raised and determined in the underlying representation case.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.<sup>2</sup>

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor

practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

## FINDINGS OF FACT

### I. THE BUSINESS OF RESPONDENT

Respondent consists of Brookside Manor, Inc. and Willowbrook, Inc., each of which are New Jersey corporations, with offices and places of business located in Wayne, New Jersey. Respondent is a health care institution engaged in the operation of nursing homes. During the year ending November 30, 1980, which period is representative of all times material herein, Respondent derived gross revenues in excess of \$100,000, and purchased and received products, goods, and materials valued in excess of \$5,000 which were delivered directly in interstate commerce from points outside the State of New Jersey.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.<sup>3</sup>

### II. THE LABOR ORGANIZATION INVOLVED

District 1199-J, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE UNFAIR LABOR PRACTICES

#### A. *The Representation Proceeding*

##### 1. The units

The following employees of Respondent constitute separate units appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

##### *Unit A*

All full-time and regular part-time registered nurses employed by the Employer, Brookside Manor, Inc. and Willowbrook, Inc., at its Wayne, New Jersey facilities, but excluding all office clerical employees, confidential employees, guards and supervisors as defined in the Act, and all other employees.

<sup>2</sup> See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

<sup>3</sup> In its answer, Respondent denies that it is an employer engaged in commerce within the meaning of the Act. In finding that Respondent is engaged in commerce, we note that Respondent's status as an employer under the Act was previously determined in the underlying representation proceeding.

*Unit B*

All full-time and regular part-time service, maintenance and technical employees, including licensed practical nurses, employed by the Employer, Brookside Manor, Inc. and Willowbrook, Inc., [at its] Wayne, New Jersey facilities, but excluding all office clerical employees, confidential employees, professional employees, guards and supervisors as defined in the Act and all other employees.

## 2. The certification

On September 17, 1980, a majority of the employees of Respondent in said units, in a secret-ballot election conducted under the supervision of the Regional Director for Region 22, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said units on September 25, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

*B. The Request To Bargain and Respondent's Refusal*

Commencing on or about October 15, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described units. Commencing on or about October 28, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said units.

Accordingly, we find that Respondent has, since October 28, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate units, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

## IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate units and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate units will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate units. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

## CONCLUSIONS OF LAW

1. Brookside Manor, Inc. and Willowbrook, Inc. is a joint employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. District 1199-J, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. The following units constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time registered nurses employed by the Employer, Brookside Manor, Inc. and Willowbrook, Inc., at its Wayne, New Jersey facilities, but excluding all office clerical employees, confidential employees, guards and supervisors as defined in the Act, and all other employees.

All full-time and regular part-time service, maintenance and technical employees, including licensed practical nurses, employed by the Employer, Brookside Manor, Inc. and Willowbrook, Inc., [at its] Wayne, New Jersey facilities, but excluding all office clerical employees, confidential employees, professional employees, guards and supervisors as defined in the Act and all other employees.

4. Since September 25, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate units for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 28, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate units, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Brookside Manor, Inc. and Willowbrook, Inc., Wayne, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with District 1199-J, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following separate appropriate units:

All full-time and regular part-time registered nurses employed by the Employer, Brookside Manor, Inc. and Willowbrook, Inc., at its Wayne, New Jersey facilities, but excluding all office clerical employees, confidential employees, guards and supervisors as defined in the Act, and all other employees.

All full-time and regular part-time service, maintenance and technical employees, including licensed practical nurses, employed by the Employer, Brookside Manor, Inc. and Willowbrook, Inc., [at its] Wayne, New Jersey facilities, but excluding all office clerical employees, confidential employees, professional em-

ployees, guards and supervisors as defined in the Act and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate units with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facilities located at 499 Newark-Pompton Turnpike and 897 Black Oak Ridge Road, Wayne, New Jersey, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

<sup>4</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with District 1199-J, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, as the exclusive representative of the employees in the bargaining units described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining units described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining units are:

All full-time and regular part-time registered nurses employed by the Employer, Brookside Manor, Inc. and Willowbrook, Inc., at its Wayne, New Jersey facilities, but exclud-

ing all office clerical employees, confidential employees, guards and supervisors as defined in the Act, and all other employees.

All full-time and regular part-time service, maintenance and technical employees, including licensed practical nurses, employed by the Employer, Brookside Manor, Inc. and Willowbrook, Inc., [at its] Wayne, New Jersey facilities, but excluding all office clerical employees, confidential employees, professional employees, guards and supervisors as defined in the Act and all other employees.

BROOKSIDE MANOR, INC. AND WILLOWBROOK, INC.